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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM BARSTOW III,

Petitioner,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 724(b) of the Bankruptcy Code authorizes distribution of proceeds of valid tax liens to priority creditors in classes § 507(a)(1)-(7), a process called tax lien subordination. The statute, by its own terms, applies tax lien subordination to any "*lien* that is not avoidable under this title and that secures an allowed claim for a tax . . ." The term "lien" is defined in § 101(37) and includes "statutory lien" and "judicial lien" which are defined in §§ 101(53) and 101(36), respectively, as subsets of the boarder term "lien." The Ninth Circuit held that § 724(b) can apply only to a "statutory lien," thus excluding the IRS's "judicial lien." The court below refused to apply the result mandated by the text (i.e. "lien" including the defined subset "judicial lien"). The text was ignored because the court found that the text would achieve a result in the case that did not represent "sound policy."

The question presented is whether a court can disregard the unambiguous text of a statute, disapprove of the results achieved by the text of the statute, and then apply the court's substituted policy-making to decide how the statute should operate. The question is amplified by the fact that the language at issue in the statute is used throughout the Bankruptcy Code.

STATEMENT PURSUANT TO RULE 29.6

Petitioner is the Chapter 7 Trustee for the bankruptcy estate of MarkAir, Inc. in a bankruptcy case originally filed as a Chapter 11 on April 14, 1995, and which converted to Chapter 7 liquidation on November 8, 1995. MarkAir Inc. was a wholly owned subsidiary of Alaska International Industries (AII), a closely held corporation. Neither AII nor MarkAir was a publicly traded company.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment in this case entered by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Bankruptcy Court's opinion (per Herbert A. Ross) denying the Trustee's request to subordinate the proceeds of the IRS tax lien (Appendix C at 38a-41a) was not published. The District Court's opinion (per James K. Singleton) affirming the Bankruptcy Court (Appendix B at 21a-37a) was not published. The Court of Appeals opinion (per Graber, joined by Fletcher and Alarcon) is published at 308 F.3d 1038 (9th Cir. 2002) (Appendix A at 1a-20a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on October 21, 2002, (Appendix A at 1a) and denied rehearing and rehearing en banc on December 13, 2002 (Appendix D at 42a). Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The controlling provisions in this case are 11 U.S.C. § 724(b) and the statutory definitions of "judicial lien," "lien," and "statutory lien," which are set forth in 11 U.S.C. §§ 101(36), (37) and (53), respectively. These provisions are reprinted at Appendix G, 72a-74a.

STATEMENT OF THE CASE

The facts are simple. The record is brief. The Trustee seeks to recover the proceeds of a judicial lien securing debt owed for federal excise taxes. The proceeds will be used to pay priority claims of consumers who purchased tickets from MarkAir prior to the bankruptcy for flights that MarkAir cancelled after it filed its Chapter 11 petition. These claims are given priority under 11 U.S.C. § 507(a)(6) as consumer deposits not exceeding the sum of $1,950 per creditor.

Pursuant to 11 U.S.C. § 724(b)(2), the § 507(a)(6) ticketholder claims take priority over the IRS' claim to the tax lien proceeds. The tax lien proceeds are used to pay priority creditors with allowed claims in classes §§ 507(a)(1)-(a)(7). The MarkAir bankruptcy estate does not have sufficient assets to pay priority creditors in full, even counting the proceeds of the IRS' judicial lien.[1] As a result, the subordination of the IRS' judicial lien proceeds to priority creditors under § 724(b) will produce no return to the IRS on its secured claim. The outcome of this case determines whether the tax lien proceeds are paid to the priority ticket claimants or to the IRS.

MarkAir filed its first Chapter 11 petition in June of 1992 (MarkAir I, Case no. A92-00476). The MarkAir I case produced a confirmed plan of reorganization. When the debtor was unable to perform on the confirmed Chapter 11 plan, a second Chapter 11 petition was filed on April 14, 1995 (MarkAir II, Case no. A95-00236). The MarkAir II case was converted to Chapter 7 on November 8, 1995. The present claim for tax lien subordination arises in the MarkAir II case.

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1. The IRS' lien is in the amount of about $2.2 million. Total § 507(a)(6) claims are about $3.0 million.

The IRS' judicial lien originated from a court order in MarkAir I which approved a settlement between the IRS and MarkAir. The IRS had claimed a right to setoff against a tax refund owed to MarkAir. The debtor challenged the IRS setoff and sought recovery of the tax refund. The IRS and the debtor resolved the dispute by settlement. Under the terms of the settlement, the IRS was paid about $1.3 million in cash. An additional sum of $1.8 million was deposited with the Clerk of the Bankruptcy Court to secure a debt owed to a senior creditor and to secure debt owed to the IRS for pre-petition excise taxes. The IRS was expressly granted a second position "judicial lien" on the $1.8 million. The agreement was approved by a final order of the Bankruptcy Court entered in the MarkAir I case upon notice to creditors.[2]

On January 16, 1996 (after the ARC senior judicial lien was paid off), the IRS filed a motion in the MarkAir II case to recover the collateral deposit. The IRS sought recovery of the collateral as the holder of a "judicial lien" against the funds. The Trustee opposed on the grounds that the IRS' tax lien was subject to subordination under 11 U.S.C. § 724(b). By order entered July 10, 2000, the Bankruptcy Court denied the Trustee's request and ordered the lien proceeds released to the IRS to pay prepetition excise taxes (which the Trustee later paid to the IRS under a stipulated reservation of rights). Appendix C at 40a. In a companion memorandum decision issued the same day, the court concluded that "Section 724(b) was intended to apply

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2. Appendix A at 3a. The first place judicial lien (in favor of Airline Reporting Corporation) was paid off soon after the MarkAir II case converted to Chapter 7. Most of the basic facts are set out in *In re MarkAir Inc.* (Barstow v. IRS). The Ninth Circuit failed to mention that the debtor in Markair I had challenged the IRS claim to setoff rights. *See* Appellant's Supplemental Excerpts of Record at 107-111 (filed with the Ninth Circuit).

to statutory liens, and not the contractual type of lien involved in this case." Appendix C at 39a.

The Bankruptcy Court's Memorandum Decision refers to the IRS' lien as a "contractual type of lien." *Id.* This would suggest that it meets the definition of a "security interest" under § 101(51), i.e., a "lien created by an agreement." However, the final order in MarkAir I specifies that the IRS has a "judicial lien," and it has been conceded by all that the IRS holds a "judicial lien." Appendix A at 6a-7a. Because § 724(b) uses the broader term "lien" to define tax liens subject to subordination, it necessarily picks up both "judicial liens" and "security interests". *See* discussion, *infra*. Therefore, it makes no difference whether the IRS' lien is deemed to be a judicial lien or a security interest. In either event, it is still a "lien" that is subject to subordination under § 724(b).[3]

The District Court affirmed the Bankruptcy Court in an order and decision entered August 3, 2001. Appendix B at 21a-37a. The Ninth Circuit affirmed the District Court. In its central holding, the Ninth Circuit concluded that the term "tax lien" was ambiguous (Appendix A at 12a) and did not inherently refer to "lien," as defined in § 101(37) of the Bankruptcy Code or the subcategory of "judicial lien" defined in § 101(36). However, the operative text of the statute—appearing seven times in § 724(b)—is not "tax lien," it is "such tax lien." The words "tax lien" never appear in the § 724(b) without the important modifier "such." The word "such" carries the ordinary meaning "aforementioned" or

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3. The IRS, in any event, is bound by the designation of "judicial lien" in the Markair I court order. *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2917-2918, 77 L. Ed. 2d 509 (1983); *United States v. Armour & Co.*, 402 U.S. 673, 681-682, 91 S. Ct. 1752, 1757-1758 (1971).

"previously referred to." The word "such" acts as a reference to the definitional antecedent at the beginning of § 724(b): "*lien* that is not avoidable under this title and that secures an allowed claim for a tax."

The Ninth Circuit found ambiguity where none existed in the text—viz, in the term "tax lien" rather than in the actual term used, "such tax lien." Armed with this "ambiguity," the court then consulted extrinsic sources. It found that neither the legislative history nor the text "provide a definitive answer. . . ." Appendix A at 15a-16a. The court ultimately relied upon its own determination of what is correct "policy." Appendix A at 18a-19a. The court declared that if the IRS' judicial lien were subordinated, it would discourage the IRS from entering into compromises with taxpayers. *Id.* For policy reasons, therefore, the term "such tax lien" could not refer to the antecedent, "lien . . . that secures an allowed claim for tax." The statute could not be read literally to apply to any "*lien* . . . that secures an allowed claim for tax" as "lien" is defined in § 101(37) of the Bankruptcy Code. It could only apply to any "*statutory lien* . . . that secures an allowed claim for a tax." The text was rejected in favor of the court's own view on how the statute should operate.[4]

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4. The Ninth Circuit cited the Markair I court ordered "protections" by which the order was to "remain in full force and effect" in any subsequent bankruptcy case filed by Markair. Appendix A at 3a-4a. However, the circuit court did not hold that the Markair I order modified the rights of unknown future priority creditors in any subsequent Markair bankruptcy case. That would have been a procedural impossibility and a clear violation of due process. Instead, the Ninth Circuit held that § 724(b) applied only to "statutory liens . . . that secure an allowed claim for a tax." The decision turned exclusively on the scope of the statute and not on a theory that the Markair I order could modify the rights of priority unsecured creditors in a future Markair bankruptcy case.

REASONS FOR GRANTING THE WRIT

This petition for certiorari should be granted for at least three different reasons. First, the Ninth Circuit has refused to apply the unambiguous text of a statute on the grounds that applying the text of the statute represents bad policy. Because the Ninth Circuit disapproves of the result achieved by the text, it substitutes a result that it considers to be "better." The effect is a judicial usurpation of enumerated legislative powers delegated exclusively to Congress under Article I § 8 of the Constitution, (viz, the "power to lay and collect taxes" and "establish . . . uniform laws" of bankruptcy).

Second, there is a split of the circuits on the question of whether the text of § 724(b) must give way to judicially crafted notions of policy. The Ninth Circuit has concluded that a literal application of § 724(b) cannot apply if the text produces results that are judicially determined to be inappropriate. The Sixth Circuit, by contrast, has insisted that policy decisions on tax lien subordination are manifested in the text of § 724(b), which must be applied as written.

Third, the Ninth Circuit has failed to apply, indeed ignored, defined terms and standard usage that appear throughout the Bankruptcy Code. The term "such tax lien," which appears seven times in § 724(b), is a reference back to the definitional antecedent "*lien* . . . that secures an allowed claim for tax." The use of the word "such" to modify a noun and refer to an antecedent (i.e., such [noun] = definitional antecedent) occurs *hundreds of times* in Title 11. Appendix E at 44a-69a. The Ninth Circuit, by ignoring the word "such" in § 724(b), debases this usage everywhere else it appears in

Title 11. If "such" does not carry its normal meaning in § 724(b), then there is no reason why it should carry its normal meaning, or be binding on federal courts, in any of the hundreds of other provisions of Title 11 where the word "such" is used to refer to a definitional antecedent.[5]

I. THE CIRCUIT COURT UNLAWFULLY EXERCISED ARTICLE I POWERS BY PREEMPTING THE STATUTORY TEXT AND SUBSTITUTING ITS OWN POLICY DECISION.

The Ninth Circuit attempts to circumvent the unambiguous text of the statute by holding that the operative term for defining the scope of tax lien subordination is "tax lien." Appendix A at 7a-9a and 12a-20a. The court looks to sources outside the statute to establish an ordinary language meaning for "tax lien" and justify limiting the scope of the statute to the narrower term "statutory lien . . . that secures an allowed claim for a tax." The exercise is pointless since the operative term in § 724(b) is "such tax lien" rather than "tax lien." The Ninth Circuit's finding of ambiguity is based on a false premise—ignoring the word "such" as it appears in the statute and ignoring its effect—the reference to the definitional antecedent, "*lien* . . . that secures an allowed claim for a tax."

This false premise of textual ambiguity then leads to the Ninth Circuit's discussion of extrinsic aids. It is well recognized that extrinsic aids cannot be used when the meaning of the statute is already clear. The unambiguous text

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5. The same analysis applies to the Ninth Circuit's failure to apply the defined term "lien" in accordance with the all encompassing statutory definition in § 101(37) which incorporates the subcategory "judicial lien" as defined in § 101(36).

controls.[6] Since the statute is unambiguous, extrinsic sources cannot be used to alter the mandate of the text. The Ninth Circuit's use of extrinsic sources is contrary to the text and defeats Congressional will.

A. Unambiguous Text

The text of § 724(b) applies tax lien subordination to any "*lien*"—"statutory lien" or "judicial lien" (or "security interest")—"that secures an allowed claim for a tax." The text cannot support any other conclusion:

> § 724(b) Property in which the estate has an interest and that is subject to a *lien* that is not avoidable under this title and *that secures an allowed claim for a tax*, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a *lien* on such property that is not avoidable under this title and that is senior to *such tax lien*;

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6. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149. 117 L. Ed. 2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Barnhill v. Johnson*, 503 U.S. 393, 401, 112 S. Ct. 1386, 1391, 118 L. Ed. 2d 39 (1992) ("appeals to statutory history are well taken only to resolve statutory ambiguity"); *Patterson v. Shumate*, 504 U.S. 753, 760, 112 S. Ct. 2242, 2248, 119 L. Ed. 2d 519 (1992) ("Given the clarity of the statutory text," the proponent of an alternative reading "bears an exceptionally heavy burden.").

(2) second, to any holder of a claim of a kind specified in sections 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by *such tax lien*;

(3) third, to the holder of *such tax lien*, to any extent that such holder's allowed tax claim that is secured by *such tax lien* exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a *lien* on such property that is not avoidable under this title and that is junior to *such tax lien*;

(5) fifth, to the holder of *such tax lien*, to the extent that such holder's allowed claim secured by *such tax lien* is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

. . .

The text of § 724(b) applies tax lien subordination to any "*lien* . . . that secures an allowed claim for a tax." The Ninth Circuit held that § 724(b) can only apply to a "*statutory lien* . . . that secures an allowed claim for a tax." The text of the statute conclusively shows reversible error by the court below.

The term "lien" is defined by 11 U.S.C. § 101(37) as a "charge against or interest in property to secure payment of a debt or performance of an obligation . . ." The defined term

"lien" includes all defined subcategories of "lien"— "statutory lien," "judicial lien," and "security interest":

> Paragraph 28 [now paragraph 37 of § 101] defines "lien." The definition is new and is very broad.... In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens.[7]

The terms judicial lien, security interest, and statutory lien are each defined, respectively, in § 101(36), (51), and (53), by the use of the broader defined term "lien." A "judicial lien" under § 101(36) is a "*lien* obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." A "statutory lien" under § 101(53) is a "*lien* arising solely by force of a statute on specified circumstances or conditions." A "security interest" under § 101(51) is a "*lien* created by an agreement." By statutory definition, a "*lien* . . . that secures an allowed claim for a tax" in § 724(b) includes the subcategory "judicial lien."

Congress uses the term "lien" in a provision of Title 11— § 724(b)—and has also defined that term in Title 11— § 101(37). It necessarily follows that the term "lien" in § 724(b) coincides with the Bankruptcy Code's definition of the term "lien" in § 101(37): "When a statute includes an explicit definition, we must follow that definition . . ."[8]

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7. Senate Report No. 95-969 at 25, reprinted in U.S. Code Cong. & Admin. News at 5811 (1978).

8. *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 2615, 147 L. Ed. 2d 743 (2000); *see also Fox v. Standard Oil Company of*

(Cont'd)

The repeated use of a term in an integrated Code (such as Title 11) doubly requires that the codified definition be applied in accordance with its defined meaning.[9]

A "statutory lien" is a "lien"—but a "lien" is far more than just a "statutory lien." Because Congress used the term "lien" in the opening text of § 724(b), a "tax lien" is not just a "statutory lien" that secures a tax claim. It is any "lien" that secures a tax claim, including any "judicial lien." The judicial lien obtained by the IRS is a subcategory of "lien" as defined in § 101(37). The IRS' judicial lien is a "lien . . . that secures an allowed claim for a tax" and is subject to tax lien subordination under § 724(b).

The text of § 724(b) conclusively shows that Congress meant the broader term "lien" rather than the narrower term "statutory lien." Congress knew the difference between these terms since Congress codified definitions for "lien" and "statutory lien" in 11 U.S.C. §§ 101(37) and (53). Congress

(Cont'd)

New Jersey, 294 U.S. 87, 96, 55 S. Ct. 333, 337, 79 L. Ed. 780 (1935) (Where Justice Cardozo observed: "There would be little use in such a glossary if we were free in spite of it to choose a meaning for ourselves.").

9. *CIR v. Keystone Consolidated Industries*, 508 U.S. 152, 159, 113 S. Ct. 2006, 2011, 124 L. Ed. 2d 71 (1993) (The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." The Court in *CIR* emphasized that "the Code [IRC] must be given as great an internal symmetry and consistency as its words permit" (*id.*)—a conclusion equally applicable to the Bankruptcy Code.); *see also Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 660, 126 L. Ed. 2d 615 (1994) ("A term appearing several places in a statutory text is generally read the same way each time it appears.").

actually uses the term "statutory lien" to establish subordination of *nontax* liens in § 724(d). Subsection (d) applies to "*non-tax statutory liens* that have a priority determined in the same manner as the priority of tax liens under Internal Revenue Code Section 6323."[10] For these *nontax* liens, lien subordination is restricted exclusively to "*statutory liens*." The subordination contemplated by subsection (d) does not extend to judicial liens or security interests.

Congress uses the defined term "lien," rather than "statutory lien" to establish the scope of tax lien subordination in § 724(b): Congress uses the narrower defined term "statutory lien" to limit the scope of subordination for nontax liens in § 724(d). The distinction has to be considered intentional:

> It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another . . .[11]

Different terms have different meanings. The use of different language creates the inference that Congress meant different things and that Congress does not use different language in

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10. *Collier on Bankruptcy* § 724.05 at 724-18 (15th ed. 2001) (emphasis added).

11. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556 (1994), quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 1593, 128 L. Ed. 2d 302 (1994); *Bates v. United States*, 522 U.S. 23, 29-30, 118 S. Ct. 285, 290, 139 L. Ed. 2d 215 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

different provisions to accomplish the same result. "Lien" in § 724(b) means "lien" as defined in § 101(37). It cannot mean "statutory lien."

This conclusion is further demonstrated by the use of the word "lien" in §§ 724(b)(1) and (b)(4). These subparagraphs regulate distributions on account of valid nontax liens which are not affected by tax lien subordination. In §§ 724(b)(1) and (b)(4), the broader term "lien" is used to refer to "any holder of an allowed claim secured by a *lien* on such property . . ." The term "lien" in §§ 724(b)(1) and (b)(4) cannot be limited solely to "statutory lien." It has to include judicial liens and security interests, precisely because these types of nontax liens are not affected by tax lien subordination:

> The result of these provisions [§§ 724(b)(1) and (b)(4)] are to leave senior and junior [non-tax] lienors . . . undisturbed.[12]

Paragraphs (1) and (4) require distributions to nontax creditors who hold "security interests" such as mortgages.[13] Distributions on account of "liens" under §§ 724(b)(1) and (b)(4) also include "judicial liens" which secure payment of

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12. House Report No. 95-595 at 382, *reprinted in* 5 U.S. Code Cong. & Admin. News at 6338. *In re Soltan*, 234 B.R. 260, 274 (Bk. N.Y. 1999) "When Section 724(b) is applied properly, no senior or junior (non-tax) lienholders should be disturbed . . ."; *Collier on Bankruptcy* § 724.03[3][d] at 724-12-13 ("The effect of Section 724(b) is to adjust distributions as between the holder of the tax lien and the trustee without affecting other lienholders").

13. *See, e.g., In re Dowco Petroleum, Inc.*, 137 B.R. 207, 213 (Bk. Tex. 1992); *In re K.C. Machine & Tool Co.*, 816 F.2d 238, 243 (6th Cir. 1987).

nontax claims.[14] Since the broader term "lien" has to apply in §§ 724(b)(1) and (b)(4) to secured non-tax claims, it must also apply in the opening text of § 724(b) to secured tax claims.

The statute is decidedly *not* ambiguous. It applies to any "*lien* . . . that secures an allowed claim for a tax." If this statute is ambiguous, then no statute is free of ambiguity; the text of every Congressional enactment becomes nothing more than a suggestion; courts become free to go beyond the text of the statute and consult any extrinsic sources they wish; they may even rely on their own wisdom as to what the court—not Congress—believes to be "sound policy." No court has that authority. No court can "rewrite the statute based on [its own] notions of appropriate policy."[15]

The method used by the Ninth Circuit to find ambiguity was itself inherently flawed. The court singled out as ambiguous the term "tax lien," a term that does not exist in the text of § 724(b). The actual term used is "such tax lien." An "ambiguity" can exist here only by ignoring the modifier "such" in each of the seven instances that "tax lien" (or rather "such tax lien") appears in § 724(b). The Ninth Circuit could not ignore the word "such" in "such tax lien." No court has authority to edit out the words of a statute. In construing a statute, courts "are obligated to give effect, if possible, to every word Congress used."[16] It is a "cardinal principle of

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14. *See, e.g., In Re Soltan*, 234 B.R. 277-280; *In Re Hydrochem Processing*, 190 B.R. 129 (Bk. Ga. 1995).

15. *Bankamerica Corp. v. United States*, 462 U.S. 122, 140, 103 S. Ct. 2266, 2276, 76 L. Ed. 2d 456 (1983).

16. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 2331, 60 L. Ed. 2d 931 (1979).

statutory construction" that "no clause, sentence or word shall be superfluous, void or insignificant."[17]

The term "such tax lien" is defined in § 724(b) by the antecedent, "*lien* . . . that secures an allowed claim for a tax." Codified definitions are not limited to definition sections. "Statutory definitions may appear either in separate sections or in the body of substantive provisions."[18] The statutory definition controls "even if it varies from that term's ordinary meaning."[19] "Such tax lien" means "lien" as defined in § 101(37) and not some definition found outside the statute.

B. Extrinsic Sources

The text of the statute "must ordinarily be regarded as conclusive . . . unless exceptional circumstances dictate otherwise."[20] Anyone attempting to contradict an unambiguous statutory text "bears an exceptionally heavy

17. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001); *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520, 99 L. Ed. 615 (1955).

18. Sutherland Statutory Construction, Vol. 2A § 47:07 at 227 (Sands ed. 2000).

19. *Stenberg v. Carhart*, 530 U.S. at 942, 120 S. Ct. at 2615. *See also Meese v. Keene*, 481 U.S. 465, 484, 107 S. Ct. 1862, 1873, 95 L. Ed. 2d 415 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

20. *Burlington Northern Railway Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461, 107 S. Ct. 1855, 1860, 95 L. Ed. 2d 404 (1987).

burden."[21] Since § 724(b) is unambiguous, the court below could not rely on extrinsic sources to find ambiguity. Extrinsic sources are used only to resolve ambiguity.[22] They cannot be used to fabricate an ambiguity that does not exist in the text. "[W]hen the words of a statute are unambiguous, then . . . judicial inquiry is complete."[23]

The Ninth Circuit cites, as an extrinsic source, § 67c(3) of the Chandler Act, the predecessor of § 724(b).[24] Section 67c(3) applied tax lien subordination to "every tax lien against personal property not accompanied by possession." By contrast, § 724(b) applies tax lien subordination to any "lien that is not avoidable under this title and that secures an allowed claim for a tax." The Ninth Circuit assumes there is continuity intended between § 67c(3) and § 724(b). The text of the two statutes conclusively proves otherwise.[25] The Ninth

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21. *Patterson v. Shumate*, 504 U.S. at 760, 112 S. Ct. at 2248; *Union Bank v. Wolas*, 502 U.S. 151, 155-156, 112 S. Ct. 527, 530, 116 L. Ed. 2d 514 (1991) ("Given the clarity of the statutory text, respondent's burden of persuading us . . . is exceptionally heavy").

22. *Barnhill v. Johnson*, 503 U.S. at 401, 112 S. Ct. at 1391 ("appeals to statutory history are well taken only to resolve statutory ambiguity").

23. *Connecticut National Bank v. Germain*, 503 U.S. at 254, 112 S. Ct. at 1149.

24. PL 89-495; 80 Stat. 268 § 4. The text of § 67c(3) is set out at Appendix G, 75a.

25. Among other things, § 724(b) expands the scope of tax lien subordination to include liens against both real and personal property. It drops the limitation that the lien be "accompanied by possession"

(Cont'd)

Circuit's obsession with the term "tax lien" fixates on a relic of the former statute. The term "tax lien" in § 67c(3) was supplanted in § 724(b) by the term "lien"—a term that was first defined by § 101 of the 1978 Code. What controls is the text of § 724(b) and not the prior, superseded statute.

The Ninth Circuit cites a statement in the legislative history of § 724(b) that tax lien subordination under the 1978 Code applies "without substantial modification in result."[26] These words do not say what type of liens are subject to tax lien subordination, but rather what happens to those liens that are subject to subordination. The quoted excerpt cannot demonstrate continuity in the scope of tax lien subordination—the change in the text of the statute conclusively demonstrates the intent to expand the scope. The reference cited is about the effect which tax lien subordination has on liens that are already determined to be subject to the statute. The result of tax lien subordination—its effect on subordinated liens—remains the same. The lien proceeds are distributed to priority creditors. This snippet in the legislative history (which the court below misread) cannot override the text of the statute.[27]

(Cont'd)

and, of course, § 724(b) uses the defined term "lien" to apply tax lien subordinate to any "lien . . . that secures an allowed claim for a tax." The term "lien" was newly defined by the 1978 Bankruptcy Code. *See* n.7 *supra* and accompanying text.

26. Appendix A at 14a.

27. *Patterson v. Shumate*, 504 U.S. at 762, 112 S. Ct. at 2248 ("meager excerpts" from legislative history cannot control "in derogation of the statute's clear language."); *see also* nn.6 and 21, *supra*.

The court below was even wrong in concluding that "tax lien" in common parlance can only mean "statutory lien" and cannot include "judicial lien." Tax liens can and do include judicial liens that secure tax claims. *See* Appendix F at 70a-71a (citing numerous examples of judicial liens that secure tax claims). The extrinsic sources cited by the Ninth Circuit cannot overcome the "heavy burden" of persuasion imposed by an unambiguous text.[28]

C. Text v. Policy

The Ninth Circuit disagreed with the result achieved by the text of the statute. It concluded that the result mandated by the text did not represent sound policy. The Ninth Circuit was concerned that if the statute were applied literally to the IRS lien, then the IRS would be loath to enter into settlements in the future, thereby producing policy results that the Ninth Circuit considered inappropriate. Appendix A at 19a. These are not matters within the province of the IRS or the courts. These are policy decisions for Congress to make. Congress decides what is to be done with the fruits of IRS' collection efforts, not the IRS, and certainly not the Ninth Circuit.

> Congress has self-evident reasons for favoring wage claimants [507(a)(3) and (4)], farmers and fishermen [507(a)(5)], consumers [507(a)(6)], and spouses and dependent children [507(a)(7)]—even if, in the aggregate, it means some decrease in revenue for the Federal Treasury. Congress decides what happens to the proceeds of federal tax liens—not the

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28. *Patterson v. Shumate*, 504 U.S. at 760, 112 S. Ct. 2248 *and see* n.6, *supra*. In any event, the statutory definition necessarily controls regardless of what the ordinary language meaning of "tax lien" may be. *See* nn.8 and 19.

IRS or the Ninth Circuit. The IRS and the Ninth Circuit can no more complain about subordination of federal tax liens than they can complain about Congressional appropriations.

Section 724(b) does not defeat or invalidate the settlement between the IRS and MarkAir which created the judicial lien. Congress, through § 724(b), is directing the distribution of proceeds of valid, enforceable liens that secure tax claims. The text of § 724(b) mandates that any "lien that is not avoidable under this title . . ." is subject to tax lien subordination. The lien in question must be immune from the avoiding powers (11 U.S.C. §§ 544-553 and 724(a)) and from objection under non-bankruptcy law (11 U.S.C. §§ 502(b)(1) or 506(a)). Section 724(b) applies to any and all *valid* tax liens, regardless of how they arose.

Congress decided that, in Chapter 7 bankruptcy cases, proceeds of valid tax liens must be used to pay priority creditors. Congress unquestionably has the authority to establish distributional priorities in bankruptcy. Congress can also enhance the meaning and value of priority status. It has done so here under 724(b) by requiring distribution, to priority creditors, of the proceeds of any valid, and otherwise fully enforceable, "lien . . . that secures an allowed claim for a tax."

An unambiguous statute must be given its full textual effect. The words of the statute are the medium through which Congress exercises its lawful powers. Courts must be faithful to the text and give the words their full meaning. There can be no fabrication of ambiguity and no substitution of judicial wisdom to replace the mandate evidenced by the words of the statute. Section 724(b) applies tax lien subordination to any "*lien* . . . that secures an allowed claim for a tax."

The Ninth Circuit cannot limit the statute's scope to any "*statutory lien* . . . that secures an allowed claim for a tax." The statute necessarily applies to any "lien," including the "judicial lien" held by the IRS. In light of the very serious intrusion on Article I powers effected by the Ninth Circuit in its decision, certiorari should be granted in the interest of discouraging such usurpation in the future.

D. Split of the Circuits

The Ninth Circuit has disregarded the statutory text and refused to apply § 724(b) in accordance with its unambiguous meaning. Any valid "*lien* . . . that secures an allowed claim for a tax" is subject to subordination. The Ninth Circuit changed this to any valid "*statutory lien* . . . that secures an allowed claim for a tax." The court concluded that a literal application of the text constituted "bad policy." The text did not control. The Ninth Circuit's policy notions did.

This is not the first time that a circuit court has been asked to override the text of § 724(b) and apply a judicially crafted "policy" to replace the result mandated by the text. The Sixth Circuit, when presented with policy arguments about § 724(b), refused to invoke "policy" to override the statute:

> Contrary to [tax lien creditor's] urging, we decline to pass judgment on the wisdom of § 724(b). Congress passed that legislation for reasons sufficient unto itself.[29]

The lien creditor's grievance in *K.C. Machine* was that cash proceeds of a tax lien supposedly could not be distributed to

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29. *K.C. Machine & Tool*, 816 F.2d at 245.

priority creditors when the property, prior to bankruptcy sale, was fully encumbered by liens junior to the tax lien. There was no textual basis for the taxing authority's argument. The Sixth Circuit chose to adhere to the text rather than rewrite the statute to fit its own ideas about "policy."

There is considerable divergence between the application of § 724(b) by the Ninth Circuit and the Sixth Circuit. The Ninth Circuit ignores the text and applies its own policy notions on how tax lien subordination should work. The Sixth Court leaves policy decisions to Congress and applies the text of the statute. The Sixth Circuit acted within the confines of judicial authority. The Ninth Circuit did not.

II. THE DECISION BELOW DISAVOWS TEXTUAL USAGE THAT APPEARS HUNDREDS OF TIMES IN THE BANKRUPTCY CODE

The term "such tax lien" appears seven times in § 724(b) and is present in each of the first five numbered paragraphs of the statute. "Such tax lien" is shorthand for liens that are subject to tax lien subordination. It is central to defining the scope of tax lien subordination. The word "such" carries the ordinary language meaning "aforementioned" or "previously referred to." [30] It serves to refer the reader back to an antecedent. "Such tax lien" in § 724(b) refers to the antecedent, "lien that is not avoidable under this title and that secures an allowed claim for a tax." The text follows a standard formula in which the word "such" modifies the word "tax lien" to refer to a definitional antecedent. This formula—

30. *See, e.g., Gatlin Oil Company, Inc. v. United States*, 169 F.3d 207, 211 (4th Cir. 1999) (" 'such' represents the object as already particularized . . . referring to the last antecedent"—quoting Black's Law Dictionary).

such [noun] = definitional antecedent—is not limited solely to § 724(b). This same usage appears hundreds of times throughout the Bankruptcy Code. There are a minimum of 150 examples of "such usage" in the first three chapters of Title 11 alone. Examples are set forth in the Appendix E at 44a-69a.[31]

The Ninth Circuit found it "logical" that the modifier "such" refers the reader back to a definitional antecedent. Appendix A at 11a. The circuit court nevertheless refused to follow the logic of the text. The court was unable to justify its decision from the text. The only textual basis offered for the court's conclusion is a reference to the isolated words in § 724(b)(3) —"to any extent that *such holder's allowed tax claim* that is secured by *such tax lien* exceeds any amount distributed under paragraph 2 of this subsection." The circuit court believed it was redundant to use "tax " in this clause in both "allowed tax claim" and "such tax lien." This usage in § 724(b)(3) somehow disproved that "such tax lien" could refer to the definitional antecedent, "lien . . . that secures an allowed claim for a tax." Appendix A at 11a.

The court's thought process is difficult to follow—but easy to disprove. The use in § 724(b)(3) of the word "such" in "such holder's" carries its ordinary language reference to an antecedent—"the holder of such tax lien" which appears earlier in the text of § 724(b)(3). The circuit court never

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31. In just the first three Chapters of Title 11 this usage (such [noun] = definitional antecedent) appears one or more times in each of the following sections: 103, 104, 106, 108, 110, 301, 302, 303, 304, 328, 329, 330, 331, 342, 345, 346, 348, 349, 361, 362, 363, 365, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 522, 523, 524, 525, 541, 542, 543, 545, 546, 547, 548, 549, 557, 558 and 559. *See* Appendix E at 44a-69a.

suggested otherwise. If "such" carries its ordinary meaning in modifying "holder's," then "such" has to carry the same meaning in "such tax lien"—especially since "such" appears multiple times *in the same clause*:

> there is a presumption that a given term is used to mean the same thing throughout a statute . . . a presumption surely at its most vigorous when a term is repeated within a given sentence . . .[32]

It is impossible for the word "such" to carry one meaning (or none) in 724(b)(3) as a modifier of "tax lien" and a different meaning as a modifier of "holder's."

The phrases "allowed tax claim" and "such tax lien" in § 724(b)(3) are not at odds with each other. They employ two different techniques for referring to a textual antecedent. The words "allowed tax claim" are simply a paraphrase of the words "an allowed claim for a tax" that appear in the definitional antecedent in the opening text of § 724(b) ("lien . . . that secures an allowed claim for a tax."). The effect of the paraphrase is the same as using "such" to modify "tax lien." Both techniques refer to an antecedent. The fact that an antecedent can be invoked by a paraphrase, and not just by the word "such," does not mean that the word "such" loses its meaning in the statute. On the contrary, the paraphrase ("allowed tax claim") reinforces the fact that an antecedent provides the definition for the shorthand terms that are used in the numbered paragraphs—an antecedent that is invoked either by paraphrase or by the use of the adjective "such."

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32. *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 555, 130 L. Ed. 2d 462 (1994).

It is bad enough that the court below so badly mangled ordinary usage in this situation. What makes the decision even worse is that the form of usage in question—such [noun] = definitional antecedent—appears *hundreds of times* in the Bankruptcy Code. Appendix E at 44a-69a. Its ubiquity in Title 11 provides even further justification for concluding that the statute must be read exactly the way it is written. If, as the Ninth Circuit has assumed, the usage of "such" can be discounted or ignored in § 724(b), then the same textual usage is debased everywhere it appears in Title 11.

The word "such" in "such text lien" must have the same meaning each of the seven times it appears in § 724(b) (i.e., "such tax lien" = "*lien* . . . that secures an allowed claim for a tax"). Indeed, the word "such" must be applied in the same way wherever it appears in Title 11—since "reading the word differently for each code section to which it applies would open Pandora's jar."[33] It is important that the Ninth Circuit's assault on the text of the Bankruptcy Code, and on this ubiquitous textual usage, be stopped in its tracks.[34]

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33. *Ratzlaf v. United States*, 510 U.S. at 143, 141 S. Ct. at 660. *See also* n.9, *supra*.

34. The same analysis applies to the Ninth Circuit's refusal to honor the statutory definition of "lien" in the words "*lien* . . . that secures an allowed claim for a tax. The statute cannot be read to apply only to a "statutory lien . . . that secures an allowed claim for a tax." The defined term "lien" has to be applied in accordance with its codified definition—§ 101(37)—in § 724(b) (including subparagraphs (b)(1) and (b)(4)) and in every other provision of Title 11 where the term "lien" is used.

CONCLUSION

The words of a statute are the means by which Congress expresses its authority. Without the words, there is no authority. When the circuit court removed the words "such" (and "lien") from § 724(b), it also removed the authority by which the statute was promulgated. Congress became mute, its authority superseded by a judicial oracle that presumed to be the exclusive voice for the applicable law.

For the reasons stated in this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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